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In the Supreme Court of the United States

OCTOBER TERM, 1945

FERDINAND FISWICK, JACOB F. MAYER, AND FRITZ GUSTAV RUDOLPH, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the circuit court of appeals (R. 352–364)[1] and the dissent (R. 364–372) are not yet reported.

[1] The record filed by petitioners consists of the printed appendix to their brief in the circuit court of appeals, together with the proceedings in that court. This record contains the bill of exceptions in abridged form. There have also been lodged with the Clerk of this Court the original exhibits in the case. These have been transmitted, at our request, by the Clerk of the Circuit Court of Appeals.

References to the printed appendix in this brief omit the "a" which follows upon the numbering on pages 1a to 351a.

JURISDICTION

The judgment of the circuit court of appeals was entered on December 10, 1945 (R. 373), and a petition for rehearing (R. 374–385) was denied on January 26, 1946 (R. 387). The petition for a writ of certiorari was filed on March 4, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court on May 7, 1934.

QUESTION PRESENTED

Whether, in a prosecution for conspiracy to defraud the United States through the defendants' concealment of their connection with the Nazi Party, the indictment charging that the conspiracy continued to the date of its filing, September 13, 1944, and that various overt acts were committed, the latest of which occurred December 26, 1940, it was reversible error to admit as against all petitioners certain statements which each of them made after December 26, 1940, but before September 13, 1944.

STATUTES INVOLVED

Section 37 of the Criminal Code, 18 U. S. C. 88, provides as follows:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States

in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

The pertinent provisions of the Alien Registration Act, 1940 (Act of June 28, 1940, c. 439, Title III, 54 Stat. 670, 673–676, 8 U. S. C. 451–460) read as follows:

SEC. 31. (a) It shall be the duty of every alien now or hereafter in the United States, who (1) is fourteen years of age or older, (2) has not been registered and fingerprinted under section 30 [registration of aliens seeking visas to enter the United States], and (3) remains in the United States for thirty days or longer, to apply for registration and to be fingerprinted before the expiration of such thirty days.

* * * * *

SEC. 33. (a) All applications for registration and fingerprinting under section 31 shall be made at post offices or such other places as may be designated by the Commissioner [of Immigration and Naturalization].

* * * * *

SEC. 34. (a) The Commissioner is authorized and directed to prepare forms for the registration and fingerprinting of aliens under this title. Such forms shall contain inquiries with respect to (1) the

date and place of entry of the alien into the United States; (2) activities in which he has been and intends to be engaged; (3) the length of time he expects to remain in the United States; (4) the criminal record, if any, of such alien; and (5) such additional matters as may be prescribed by the Commissioner, with the approval of the Attorney General.

SEC. 36. * * *

(c) Any alien * * * who files an application for registration containing statements known by him to be false, or who procures or attempts to procure registration of himself or another person through fraud, shall, upon conviction thereof, be fined not to exceed $1,000, or be imprisoned not more than six months, or both; * * *.

Regulations governing the registration of aliens under the Alien Registration Act, 1940, were issued by the Acting Commissioner of Immigration and Naturalization on August 8, 1940, with the approval of the Attorney General (see 5 F. R. 2836-2841). Section 29.4 (l) of those regulations provides in part as follows:

(10) The alien, if fourteen years of age or older, shall state any activities in addition to his occupation in which he is, has been within the past five years, or intends to be engaged. The alien shall list the names of all clubs, lodges, groups, organizations, or societies to which he belongs

or in which he participates. If the alien holds any office or official position in any of these clubs, lodges, groups, organizations, or societies, he shall so state.

* * * * *

(15) The alien, if fourteen years of age or older, shall state whether, during the past five years, he has been affiliated with or active in (a member of, official of, a worker for) organizations, devoted in whole or in part to influencing or furthering the political activities, public relations, or public policy of a foreign government. If the alien has been affiliated with or active in any such groups or organizations, he shall list them. If he holds an office or official position in any such group or organization, he shall so state. The registration officer shall not undertake to enumerate or define any such groups or organizations.

STATEMENT

An indictment in one count was returned against petitioners and 28 others in the United States District Court for the District of New Jersey on September 13, 1944, charging the defendants with conspiring to defraud the United States in violation of Section 37 of the Criminal Code, 18 U. S. C. 88 (R. 1, 10–21; *supra*, pp. 2–3). The indictment alleged that the defendants, between September 1, 1939, and the date when the indictment was returned, conspired with each other

and with Friedhelm Draeger, Hans Vogel and Fritz Zeglin, with the German Ambassador to the United States and members of his staff, and with other representatives of Germany, to defraud the United States of its governmental function of securing a "full and complete listing and fingerprinting of all aliens residing * * * within the United States, their * * * membership in and affiliation with any * * * organizations devoted to furthering the political activities, public relations and public policy of foreign governments, and their participation in the meetings and activities of such * * * organization" (R. 11–12). The indictment then alleged that during the summer of 1941, and for five years previously, Draeger had been the German consul in New York and leader of the "overseas portion" of the Nazi Party, that during the same period Vogel, in his capacity as Draeger's secretary, was engaged in matters concerning the operation of the Party and its members in the United States; and that since 1933 the Party in the United States was an organization devoted to furthering the political activities of the German Government (R. 12–13). It was further charged that, as a part of the conspiracy, Draeger, Vogel, and the German Ambassador would direct the defendants, in registering under the Alien Registration Act, to conceal and to falsify their connection with the Nazi Party and that the defendants would accept such direc-

tions; and that the defendants would continue after the fall and early winter of 1940 to misrepresent to the United States their connection with the Nazi Party to the end that the United States would continue to be deprived of accurate information concerning the defendants' connection with the Nazi Party and to the end that the policies of the German Government would be furthered (R. 14–15).

The indictment set forth forty overt acts alleged to have been committed pursuant to the conspiracy and to effect its objects (R. 16–21). The first overt act was alleged to have been committed in July 1938 (No. 34, R. 20), the last, on December 26, 1940 (No. 24, R. 19).

After a jury trial, petitioners were convicted (R. 6);[1] petitioners Fiswick and Rudolph were each sentenced to imprisonment for a term of eighteen months, and petitioner Mayer was sentenced to imprisonment for a term of a year and a day (R. 7–8). On appeal to the Circuit Court of Appeals for the Third Circuit, the judgments of conviction were affirmed (R. 353–364, 373), one judge dissenting (R. 364–372).

Petitioners do not challenge the sufficiency of the evidence to support the verdicts of guilty.

[1] Fourteen of the defendants were granted a separate trial (R. 4); six of the defendants pleaded guilty (R. 4–5); the indictment was dismissed as to one of the defendants (R. 6). Of the seven defendants who stood trial, in addition to petitioners, the jury acquitted three and disagreed as to the other four (R. 6).

They contend (Pet. 3, 4, 11–13) that reversible error was committed in the admission of certain evidence. We here summarize such portions of the evidence material to a consideration of petitioners' contention.

Government witness Illian was employed by the German Consulate in New York City as a stenographer from March 1939 to May 1941 (R. 23, 73). She worked under the direction of Vogel, one of the conspirators. Vogel was secretary to another conspirator, Draeger, the New York district leader of the Nazi Party (R. 24–25, 26–27, 73–74). There was kept in the office of the Consulate a card file of members of the Party and applicants for membership in the Party (R. 31–32, 48, 81). In the early part of 1940 the witness prepared from the card file a list of members of and applicants for membership in the Party (R. 47–48, 50, 53, 82). The names of petitioners appeared on this list. (Gov. Ex. 17).[3] Shortly after the list was prepared the card file was destroyed (R. 50–51, 83).

In August or September 1940, Draeger sent letters to members and prospective members of the Party requesting them to call at his office for the purpose of discussing a personal matter (R. 57, 59, Gov. Ex. 36).[4] When they appeared in re-

[3] The names on this list were arranged numerically; Fiswick was No. 449, Mayer, No. 230, and Rudolph, No. 612.

[4] The letter read as follows:

"I hereby request you to look me up at the Consulate General as soon as possible for the purpose of discussing a personal matter.

Heil Hitler."

sponse to the letter, they were told by either Draeger or Vogel that in registering under the Alien Registration Act they were "not to put the fact in that they were members of the National Socialist Party" (R. 59, 64, 101–103, 112–113). Each of petitioners registered under that Act in December 1940 (R. 321–325). Item 10 on the Alien Registration Form read as follows (R. 321; see *supra*, pp. 4–5):

> I am, or have been within the past 5 years, or intend to be engaged in the following activities:
> In addition to other information, list memberships or activities in clubs, organizations, or societies.

Item 15 on the form read as follows (R. 321; see *supra*, p. 5):

> Within the past 5 years I_____
> (have, have not)
> been affiliated with or active in (a member of, official of, a worker for) organizations, devoted in whole or in part to influencing or furthering the political activities, public relations or public policy of a foreign government.

In the blank space in item 15 each of petitioners inserted the words "have not"; in respect of item 10, petitioners Fiswick and Rudolph stated, "none," while petitioner Mayer stated, "Reichsdeutshe Vereingung, New York, N. Y."

After some members of the Party had registered, it appears that certain of them were told

by Draeger or Vogel to amend their registration forms by stating that they were non-resident members of the Party (R. 64–67, 88; Gov. Ex. 38, 39).[5] Petitioners do not claim that they received these amendatory instructions.[6]

Each of the petitioners made oral and written statements to the Federal Bureau of Investigation, which were received as against all of the defendants (R. 128–148, 189–190, 192–194, 197–199, 327–341). On November 22, 1943, petitioner Mayer, in an interview with an agent of the Federal Bureau of Investigation, denied that he was a member of the Nazi Party (R. 129, 139). In an interview on the following day, Mayer told the agent that he had applied for membership in the Nazi

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[5] Gov. Ex. 39 is a form letter addressed to the United States Department of Justice, Immigration and Naturalization Service, Alien Registration Division, and reads as follows:

"I have previously registered as an alien under the above number on the form provided for that purpose. I assumed from the wording of questions Nos. 10 and 15, that these questions referred to present activities.

"However, in order to avoid any misunderstanding I wish to amend my registration so that the same shall show that I am a non-resident member of the National Socialistic German Labor Party since ----------, but have not been actively engaged in any way in said party, or on its behalf, and am not engaged in political activities in this country."

Defendants Borchardt and Ulrich filed amendatory statements that they were non-resident members of the Party (Gov. Ex. 1B and 1D).

[6] The following statement concerning these instructions appears at page 11 of petitioners' brief in the court below: "There was no proof whatsoever that any of these came into the hands of the defendants."

Party and that upon Vogel's instructions he had failed to "list his membership" when registering in 1940 (R. 140–141). He also said at this time that the reason he had not disclosed his membership the day before was because Vogel had told him not to admit his membership in the Nazi Party (R. 147). On the same day, Mayer made a written statement to the same effect. He also stated therein that Vogel told him [illegible] in respect of item 10, "Reichsdeut[illegible] New York, N. Y."; that he had never heard of that organization and was not a member thereof (R. 327–329). Petitioner Fiswick, in an interview with an F. B. I. agent on April 29, 1944, said that he had told an Alien Enemy Hearing Board on January 7, 1944, that he was not a member or prospective member of the Nazi Party and had given the same information at an earlier interview with the F. B. I. At this interview, Fiswick first reiterated his denial of connection with the Nazi Party, but then said he wanted to tell the truth (R. 192–194). Fiswick then signed a statement in which he said that he had applied for membership in the Nazi Party in 1939, and that in 1940 Vogel had told him and four other applicants for membership that they were not required "to put down in the Alien Registration form of 1940 that we were members" (R. 329–331). Petitioner Rudolph, in an interview with an F. B. I. agent on November 17, 1943, and in a written statement made the same day,

stated that he had applied for membership in the Nazi Party and that an official of the German Consulate had told him in 1940 that in the event he was questioned in registering as an alien concerning his membership in the Party, he should deny his membership (R. 197–199, 337–338). In a signed statement executed by Rudolph on September 5, 1944, he said that in failing to reveal his membership in registering as an alien in 1940 and again in 1942, he had not acted upon anyone's instructions (R. 339–341). At the trial which was held in November and December 1944 (R. 5), Rudolph testified that what he had said in his statement of September 5, 1944, was the truth (R. 244, 248).

In respect of petitioners' statements, the trial judge ruled that each of them was admissible as against the other defendants. He stated in this connection that "the conspiracy continued to the date of the return of the indictment, because I hold it a plot contemplating bringing to pass a continuing result which could not continue without the continuous cooperation of the conspirators to keep it up, and that there is such continuous cooperation." Petitioners excepted to this ruling (R. 205–206).

In his charge to the jury, the judge said (R. 290):

> There have been admitted into evidence certain statements, written statements and verbal admissions made by conspirators, of activities done in furtherance of the object

of the conspiracy; and these admissions and statements are admissible against all of the co-conspirators if made during the continuance of the conspiracy and during their participation in it. I have ruled that this is a continuing conspiracy, and * * * I have ruled that all of the admissions and all of the statements are properly evidential against all of the defendants; and these admissions and statements were not allowed for the purpose of proving the conspiracy itself, but simply to prove acts and course of conduct on the part of the individual making the statement which would be chargeable to the other co-conspirators, because done, or if done, done in furtherance of the object of the conspiracy.

ARGUMENT

The only contention advanced by petitioners (Pet. 3, 6–7, 10–12) is that the trial judge committed reversible error in admitting, as against all of them, their individual statements to agents of the F. B. I., made after December, 1940, the date of the last overt act alleged in the indictment. Proceeding on the assumption that the conspiracy was one to defraud the Government "by preventing it from obtaining * * * information to which it was entitled, by the defendants filing false Alien Registration Statements in the fall of 1940 and failing to disclose the membership of the individual defendants in the Nazi Party" (Pet. 10–11), and that this conspiracy was at an

end when the defendants filed those statements, petitioners argue that the admission of the individual statements as against all of them on the theory that the conspiracy continued down to the date of the filing of the indictment, viz: September 13, 1944, was prejudicially erroneous (Pet. 11–13). We submit that no reversible error was committed in the respect claimed by petitioners.

It is a well-settled principle in conspiracy cases that the acts or declarations of one conspirator are admissible against co-conspirators if those acts or declarations were made while the conspiracy was pending and in furtherance of its object, but that such declarations are not so admissible when they are only a narrative of past fact.[1] It is also settled that a conspiracy may be a continuous offense enduring until its purpose has been consummated or until it is abandoned.[2] And, in proving a conspiracy, the

[1] *Logan* v. *United States*, 144 U. S. 263, 308–309; see also *Delaney* v. *United States*, 263 U. S. 586, 590; *Wiborg* v. *United States*, 163 U. S. 632, 657–658; *United States* v. *Goodman*, 129 F. 2d 1009, 1013 (C. C. A. 2); *Landay* v. *United States*, 108 F. 2d 698, 703 (C. C. A. 6), certiorari denied, 309 U. S. 681; *Morrow* v. *United States*, 11 F. 2d 256, 259 (C. C. A. 8); *Murray* v. *United States*, 10 F. 2d 409, 411 (C. C. A. 7), certiorari denied, 271 U. S. 673; *Sullivan* v. *United States*, 7 F. 2d 355, 356 (C. C. A. 8), certiorari denied, 270 U. S. 648.

[2] See *Brown* v. *Elliott*, 225 U. S. 392, 400; *United States* v. *Kissel*, 218 U. S. 601, 607–608; *Eldredge* v. *United States*, 62 F. 2d 449, 450 (C. C. A. 10); *Bellande* v. *United States*, 25 F. 2d 1, 2 (C. C. A. 5), certiorari denied, 277 U. S. 607; *Nyquist* v. *United States*, 2 F. 2d 504, 505 (C. C. A. 8), certio-

Government is not confined to the overt acts charged in the indictment.[9] Moreover, it is clear that the statements containing admissions were properly admitted in evidence against the declarants under the circumstances of this case. See *infra*, note 14, p. 19. Under these principles it becomes evident, we believe, that each petitioner's statement was admissible as against all of them in so far as they related to a denial of membership in or affiliation with the Nazi Party, and that in so far as they contained admissions of such membership or affiliation and concealment thereof pursuant to the instructions of Draeger or Vogel, they were admissible, though not against all, since in that respect they were only narrative declarations of past fact. But, as we will show, *infra*, pp. 19–20, the admission of these latter declarations of past fact against all the petitioners could not have been prejudicial error.

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rari denied, 267 U. S. 606; *Remus* v. *United States*, 291 Fed. 501, 504–505 (C. C. A. 6); *Steers* v. *United States*, 192 Fed. 1, 8 (C. C. A. 6).

[9] *United States* v. *Downing*, 51 F. 2d 1030, 1031 (C. C. A. 2); *Meyers* v. *United States*, 36 F. 2d 859, 860 (C. C. A. 3), certiorari denied, 281 U. S. 735; *Marcus* v. *United States*, 20 F. 2d 454, 456 (C. C. A. 3), certiorari denied, 275 U. S. 565; *Kolbrenner* v. *United States*, 11 F. 2d 754, 756 (C. C. A. 5), certiorari denied, 271 U. S. 677; *Worthington* v. *United States*, 1 F. 2d 154, 155 (C. C. A. 7), certiorari denied, 266 U. S. 626; *Fraina* v. *United States*, 255 Fed. 28, 35 (C. C. A. 2).

Several of the overt acts specified in the indictment were proved. *E. g.*, Nos. 18, 26, and 33, that each petitioner filed an alien registration form (see R. 18–20, 320–325).

Contrary to petitioners' assertion (*supra*, pp. 13–14),[10] there is no basis in the record for their claim that the conspiracy came to an end with the filing of the registration forms in 1940. The indictment alleged specifically that after 1940 the conspirators, pursuant to the conspiracy, would continue to misrepresent their connection with the Nazi Party. It charged specifically that the conspiracy continued to the date when the indictment was filed, viz: September 13, 1944 (*supra*, p. 5). On this basis, petitioners' statements, in 1943 and 1944, denying their connection with the Nazi Party, were certainly admissible as against all of them, being plainly consistent with the allegations contained in the indictment and tending to support those allegations. As the majority of the court below said of petitioners' contention: "[It] completely overlooks not only the theory of the Government's case but the plain language of the indictment. The scheme did not end with false registration. The latter was essential but to accomplish the end result the concealment of Nazi membership had to be affirmatively maintained thereafter. A continuing conspiracy was specifically charged with the proof presented by the Government making

[10] *United States* v. *Irvine*, 98 U. S. 450, relied upon by petitioners (Pet. 6, 7, 12), held only that the crime of withholding a pension due another was not a continuing one; here, of course, there is no contention that a conspiracy cannot continue; the only question is how long it did continue.

it a jury question whether there was such a conspiracy." (R. 361)."

Nor does the decision of the Circuit Court of Appeals for the Second Circuit in *Ausmeier* v. *United States*, 152 F. 2d 349, which petitioners' cite (Pet. 7), avail them. In that case the conviction of the appellants who were prosecuted under a similar indictment was reversed because of the failure of the trial judge to instruct the jury adequately on what the court there regarded as a vital issue. Construing the indictment as charging a conspiracy to violate Section 36 (c) of the Alien Registration Act (*supra*, p. 4) by the defendants filing false statements, known by them to be false, the court concluded that the trial judge had not charged the jury "in unmistakeable language," as it thought he was required to do, that they must find that each of the defendants was a party to an agreement to file a registration form containing statements known by him to be false. 152 F. 2d at 356." But, so far as the

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[11] Petitioners do not take exception to the holding of the majority of the court below that the trial judge "left to the jury the questions of whether there was a conspiracy and if so, whether such conspiracy continued" (R. 361).

[12] Petitioners do not claim that the judge's charge was inadequate for the reason set forth in the *Ausmeier* case, and we do not think they could urge such a claim successfully, even if the indictment is construed as charging merely a conspiracy to violate the Alien Registration Act. Here the judge charged the jury that they might "consider the reasons alleged for making representations which were made by any of these defendants, in determining whether they

opinion in the *Ausmeier* case indicates, there was not before the court the question whether the conspiracy could have survived the filing of the registration statements, and there is nothing in the opinion on that question. And even if it be assumed that the indictment here involved should be construed as charging a conspiracy to violate Section 36 (c) of the Alien Registration Act, it does not follow that the conspiracy expired with the filing of the registration statements. There is ample authority, including a decision by the same court which decided the *Ausmeier* case, for the proposition that where the conspiracy charged is one to commit a substantive offense, the commission of the offense does not *ipso facto* bring the conspiracy to a conclusion, and that it may continue until such time as the conspirators have attained the ultimate object of the conspiracy, whatever that may be, which led them to the commission of the substantive offense.[12]

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were part of the conspiracy or whether they were acting from motives other than those which would indicate participation in the agreement to effectuate the object of the alleged conspiracy. You may ask yourselves whether or not any individual defendant acted in complete good faith and innocence of sharing in the charge of conspiracy." (R. 293.) We think that this instruction removes it from the criticism directed against the charge in the *Ausmeier* case.

[12] See *Hudspeth* v. *McDonald*, 120 F. 2d 962, 966 (C. C. A. 10), certiorari denied, 314 U. S. 617; *McDonald* v. *United States*, 89 F. 2d 128, 133, 134–135 (C. C. A. 8), certiorari denied, 301 U. S. 697; *Rettich* v. *United States*, 84 F. 2d 118, 121 (C. C. A. 1); *Laska* v. *United States*, 82 F. 2d 672,

Here the conspiracy did not come to an end when the defendants filed registration statements in which they concealed their connection with the Nazi Party, since an object of the conspiracy was the continued concealment thereafter of such connection.

We have indicated, *supra*, pp. 14–15, that the admission into evidence, as against all petitioners, of those portions of each petitioner's statement admitting his connection with the Nazi Party and admitting that he had concealed such connection in registering under the Alien Registration Act upon Vogel's instructions (see *supra*, pp. 10–12) may not have been justified, since those portions of the statements were obviously not in furtherance of the conspiracy but were only narrative declarations of past fact. They were admissible, of course, as against the declarant,[14] and, since each

677 (C. C. A. 10), certiorari denied, 298 U. S. 689; *United States* v. *McGuire*, 64 F. 2d 485, 493 (C. C. A. 2), certiorari denied, 290 U. S. 645; *Bellande* v. *United States*, 25 F. 2d 1, 2 (C. C. A. 5), certiorari denied, 277 U. S. 607; *Murray* v. *United States*, 10 F. 2d 409, 411 (C. C. A. 7), certiorari denied, 271 U. S. 673; *Lew Moy* v. *United States*, 237 Fed. 50, 52 (C. C. A. 8).

[14] The rule requiring corroboration of a confession of crime (See *Warszower* v. *United States*, 312 U. S. 342; *Ryan* v. *United States*, 99 F. 2d 864, 869 (C. C. A. 8), certiorari denied, 306 U. S. 635), was, we think, satisfied. There was independent proof of the conspiracy and petitioners' participation therein in the form of the list of members and prospective members on which petitioners' names appeared, through testimony by the Government witnesses that Draeger and Vogel had instructed such persons to conceal their con-

petitioner himself admitted in his statement substantially what the other petitioners said in their statements, none could have been harmed by the instruction that the jury could consider each statement as evidential against all petitioners. Cf. *Burns* v. *United States*, 279 Fed. 982, 986 (C. C. A. 8).

CONCLUSION

The decision below is correct. There is no conflict of decisions nor any other reason for further review. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

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APRIL 1946.

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nection with the Nazi Party, in that petitioners did not state any connection with the Party in registering as aliens, and in that they subsequently continued to deny such connection (see *supra*, pp. 8–12).

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